Dato' Ibrahim bin Ali v Datuk Seri Anwar bin Ibrahim

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-2581–11 OF 2013
ABDUL WAHAB PATAIL, DAVID WONG AND VARGHESE GEORGE JJCA
3 DECEMBER 2014

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Civil Procedure — Contempt of court — Order of committal — Appellant found guilty of contempt of court 'by omission' in failing to disown/distance himself as president of organisation from contemptuous article — Impugned article appeared on website bearing same name as organisation — Whether website not official one of organisation but owned by one of its members who wrote the impugned article — Whether respondent failed to rebut/challenge appellant's assertion he had no knowledge of article and had no control over its uploading onto website — Whether respondent failed to prove appellant had actual knowledge of article or sanctioned its publication or could have caused removal of article from website when he became aware of it

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While the decision in a High Court defamation suit brought by the respondent against a newspaper ('Utusan Melayu') and another party was pending, an article appeared on a website with the URL address of 'http:www.pribumiperkasa.com/' ('the offending website') entitled 'Kes Saman Utusan: Mahkamah Malaysia Bodoh Jika Anwar Menang'. This caused the respondent to initiate committal proceedings for contempt of court against the appellant, who was president of an organisation known as Pertubuhan Pribumi Perkasa Malaysia (PERKASA) and another person ('Zainuddin'), who was a member of PERKASA, with regard to the publication of the article on the premise it scandalised the judiciary and interfered with the administration of justice. The High Court which heard the contempt proceedings found both the appellant and Zainuddin guilty of contempt of court. Zainuddin was sentenced to four weeks' jail while the appellant was sentenced to a day's jail and fined RM20,000 in default two weeks' jail. The instant appeal by the appellant was against both the finding of contempt and the sentence imposed against him. In finding the appellant guilty, the High Court ruled that although he knew or ought to have known of the article in question at the time it was published and circulated, he failed to prevent its publication and circulation; that the appellant committed 'contempt by omission' when he failed as president of PERKASA to disown, disavow or distance himself from the article at the material time or ensure it was removed from the offending website. This was because the court held there was evidence to show, inter alia, that 75% of the articles on the offending website were monitored by the head of information and deputy president of PERKASA and that the website

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contained endorsements reserving copyright of materials to PERKASA. The appellant contended that the offending website was not PERKASA's official website but a personal one registered in Zainuddin's name and operated by him; that the appellant could not be responsible for what was published on the offending website and that there was no evidence to show he was either consulted or made aware of the offending article written by Zainuddin. The appellant said the respondent failed to prove beyond reasonable doubt that he (the appellant) personally knew or conspired to commit the contempt or that the publication and circulation of the offending article was within his control.

Held, allowing the appeal, setting aside the finding of contempt against the appellant and ordering his fine, if paid, to be refunded:

(1) While the impugned article was clearly an outright contempt of court, the High Court erred in holding on the facts and in law that the appellant had committed contempt of court. The appellant maintained that at all material times he had no knowledge whatsoever of the article and this fact was never challenged or rebutted by the respondent. Hence, the issue that the appellant failed to 'disown, disavow or distance himself' from the article did not arise and could not rightfully form the basis for the so-called 'contempt by omission' held to have been committed by him. The court was satisfied the impugned article was published without the appellant's actual knowledge and that he had no control as to the so-called 'commission' of the offence, if at all it occurred when the article was uploaded onto the offending website (see paras 20, 44–46).

(2) On the facts of the case, it was difficult to accept as a sound principle of law the High Court's holding that a mere passive role or 'silence' by the appellant could amount to contempt of court. It would have been another matter if there was evidence to show that the appellant did in fact have actual or real knowledge of, or sanctioned the publication of, the impugned article or even that he subsequently became aware of such publication but did not do anything to remove the same (see paras 40–41).

(3) Based on the evidence, there was no doubt the offending website was effectively the mouthpiece of PERKASA notwithstanding it was registered and operated by Zainuddin. The latter's attempt to distance PERKASA from the offending article on the ground PERKASA had another official website was shallow and feeble. Similarly, the appellant's contention that the High Court failed to appreciate that there was a difference between the two websites could not be accepted and was devoid of merit (see paras 32 & 34).

[Bahasa Malaysia summary

Sementara keputusan dalam satu saman fitnah Mahkamah Tinggi yang dikemukakan oleh responden terhadap sebuah akhbar ('Utusan Melayu') dan pihak lain itu belum selesai, satu artikel yang muncul di laman web dengan alamat URL dari 'http: www.pribumiperkasa.com/' ('laman web yang menghina') bertajuk 'Kes Saman Utusan: Mahkamah Malaysia Bodoh Jika Anwar Menang'. Ini menyebabkan responden memulakan prosiding komital kerana menghina mahkamah terhadap perayu, yang merupakan presiden sebuah organisasi yang dikenali sebagai Pertubuhan Pribumi Perkasa Malaysia (PERKASA) dan seseorang yang lain ('Zainuddin'), yang merupakan seorang ahli PERKASA, berkait dengan penerbitan artikel itu atas premis ia memalukan badan kehakiman dan mengganggu pentadbiran keadilan. Mahkamah Tinggi yang mendengar prosiding menghina mahkamah, mendapati perayu dan Zainuddin melakukan kesalahan menghina mahkamah. Zainuddin dijatuhi hukuman empat minggu penjara manakala perayu dijatuhi hukuman penjara sehari dan didenda RM20,000 ingkar dua minggu penjara. Rayuan ini oleh perayu adalah terhadap kedua-dua dapatan penghinaan dan hukuman yang dikenakan terhadapnya. Dalam mendapati perayu bersalah, Mahkamah Tinggi memutuskan bahawa walaupun dia tahu atau sepatutnya mengetahui tentang artikel yang dipersoalkan berkenaan pada masa ia diterbitkan dan diedarkan, dia gagal menghalang penerbitan dan edaran; bahawa perayu melakukan 'penghinaan melalui peninggalan' apabila beliau gagal sebagai presiden PERKASA untuk melepaskan diri, menyangkal atau menjauhkan dirinya dari artikel tersebut pada masa material atau memastikan artikel tersebut dikeluarkan dari laman web yang menghina. Ini kerana mahkamah telah memutuskan terdapat keterangan yang menunjukkan, antara lain, bahawa 75% daripada artikel di laman web yang menghina telah dipantau oleh ketua maklumat dan Timbalan Presiden PERKASA dan bahawa laman web tersebut mengandungi pengendorsan yang menyatakan pengekalan hak cipta bahan untuk PERKASA. Perayu berhujah bahawa laman web yang menghina bukanlah laman web rasmi PERKASA tetapi laman web peribadi yang didaftarkan dalam nama Zainuddin dan dioperasi olehnya; bahawa perayu tidak boleh bertanggungjawab untuk apa yang diterbitkan di laman web menghina dan bahawa tiada keterangan untuk menunjukkan sama ada dia berunding atau dimaklumkan tentang artikel menghina yang ditulis oleh Zainuddin. Perayu mengatakan responden gagal untuk membuktikan melangkaui keraguan munasabah bahawa dia (perayu) secara peribadi mengenali dan berkomplot untuk melakukan penghinaan atau bahawa penerbitan dan pengedaran artikel yang menghina berada dalam kawalannya.

Diputuskan, membenarkan rayuan, mengetepikan dapatan menghina terhadap perayu dan mengarahkan denda yang dikenakan ke atasnya, sekiranya dibayar, dipulangkan:

(1) Walaupun artikel yang dipersoalkan itu jelas merupakan satu penghinaan mahkamah secara terang-terangan, Mahkamah Tinggi terkhilaf dalam memutuskan berdasarkan fakta dan dari segi undang-undang bahawa perayu telah menghina mahkamah. Perayu menegaskan bahawa pada semua masa material dia tidak mengetahui apa-apa mengenai artikel dan fakta ini tidak pernah dicabar atau disangkal oleh responden. Oleh itu, isu bahawa perayu gagal untuk 'melepaskan diri, menyangkal atau menjauhkan diri' daripada artikel ini tidak timbul dan tidak dapat membentuk asas dengan tepat untuk 'penghinaan melalui peninggalan' yang kononnya dilakukan olehnya. Mahkamah berpuas hati yang artikel dipersoalkan itu telah diterbitkan tanpa pengetahuan sebenar perayu dan bahawa dia tidak mempunyai kawalan untuk 'melakukan' kesalahan tersebut, jika semua itu berlaku apabila artikel tersebut dimuat naik ke dalam laman web yang menghina (lihat perenggan 20, 44–46).

(2) Berdasarkan fakta kes, adalah sukar untuk menerima sebagai prinsip undang-undang wajar yang diputuskan Mahkamah Tinggi bahawa peranan pasif semata-mata atau 'diam' oleh perayu adalah menghina mahkamah. Ia akan menjadi satu lagi perkara lain jika terdapat bukti yang menunjukkan perayu sebenarnya mempunyai pengetahuan yang sebenar atau yang benar, atau membenarkan penerbitan, artikel yang dipersoalkan itu atau bahawa walaupun dia kemudiannya menyedari penerbitan itu tetapi tidak berbuat apa-apa untuk mengeluarkan penerbitan tersebut (lihat perenggan 40–41).

(3) Berdasarkan keterangan, tiada keraguan laman menghina secara efektif merupakan jurucakap daripada PERKASA walaupun ia telah didaftarkan dan dikendalikan oleh Zainuddin. Percubaan Zainuddin untuk menjauhkan PERKASA daripada artikel yang menghina atas alasan PERKASA mempunyai satu lagi laman web rasmi adalah cetek dan lemah. Begitu juga, hujahan perayu bahawa Mahkamah Tinggi gagal untuk memahami bahawa terdapat perbezaan di antara kedua-dua laman web tidak boleh diterima dan adalah tidak bermerit (lihat perenggan 32 & 34).]

Notes

For cases on order of committal, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2194–2225.

Cases referred to

AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd [2012] 1 LNS 478, HC (refd)

Asia Pacific Parcel Tanker Ptd Ltd v The Owners of the Ship or Vessel 'Normar Splendour' [1999] 6 MLJ 652; [1999] 7 CLJ 213, HC (refd)

Attorney General, Malaysia v Manjeet Singh Dhillon [1991] 1 MLJ 167; [1991] 1 CLJ Rep 22, SC (refd)

Byrne v Deane [1937] 1 KB 818, CA (refd)
Grocon & Ors v Construction, Forestry, Ministry and Energy Union & 2 Ors [2014] VSC 134, SC (refd)
R v Grey (1900) 2 QBD 36, QBD (refd)
Rex v Walter (1799) 170 ER 524 (refd)
Bramblevale Ltd, Re [1970] 1 Ch 125, CA (refd)
Stemlife Berhad v Bristol Meyers Squibb (M) Sdn Bhd & Anor [2009] MLJU 1248; [2009] 1 LNS 1272, HC (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)
Wee Choo Keong v MBF Holdings Sdn Bhd & Anor [1995] 3 MLJ 549, SC (refd)

Legislation referred to

Societies Act 1966 ss 51(1), (2)

Appeal from: Suit No 23 NCVC(6)10–01 of 2012 (High Court, Kuala Lumpur)

Adnan bin Seman (Adnan Sharida & Associates) for the appellant.
Sivarasa Rasiah (Shahid Adli bin Kamarudin with him) (Daim & Gamany) for the respondent.
Steven Thiru (Gregory Vinesh Das and Aimee Lee with him) (Cheah Teh & Su) for the Malaysian Bar as amicus curiae.
Mohammad Al-Saifi Haji Hashim (Senior Federal Counsel, Attorney General's Chambers) for the Federal Government of Malaysia as amicus curiae.

Varghese George JCA:

[1] The principal suit was a defamation action brought by the plaintiff against a newspaper and another. This suit had been tried before VT Singham J and the court had fixed the 21 March 2013 for delivery of decision.

[2] On 7 January 2013 an article entitled 'Kes Saman Utusan: Mahkamah Malaysia Bodoh Jika Anwar Menang' was found published on the website with the URL address of 'http:www.pribumiperkasa.com/' ('the article').

[3] The plaintiff commenced proceedings against:

(a) Zainuddin bin Salleh, and

(b) Ibrahim bin Ali

to commit them for contempt of court with regard to the publication of the article.

[4] John Louis O'Hara J at the High Court on 19 November 2013 held that both Zainuddin bin Salleh (first contemnor) and Ibrahim bin Ali (second contemnor) were guilty of contempt of court. His Lordship proceeded to:

(a) commit the first contemnor to prison for a period of four weeks from that date; and

(b) commit the second contemnor to prison for one day and also to fine him RM20,000, in default of payment of the fine, a further two weeks imprisonment.

[5] This appeal before us was the appeal of the second contemnor against both the finding of contempt and the sentence imposed by the court against him. (The first contemnor had also lodged an appeal against the committal order made against him on 13 November 2013 but has since withdrawn his appeal.)

SECOND CONTEMNOR'S SUBMISSION

[6] It was contended that the article had been admitted to be authored solely by the first contemnor. It was first posted as a blog on www.ob21.net (at 8.48pm on 7 January 2013), which was a website registered in the name of the first contemnor, who also referred to himself as 'Zainuddin@obey_one'.

[7] According to the first contemnor, the article had also been downloaded into the following websites on the same day:

(a) http://www.jomtibai.com/;

(b) http://www.tribunerakyat.net: and

(c) the earlier referred — http:www.pribumiperkasa.com/

all of which were hyperlinked to www.ob21.net.

[8] The first contemnor had also on affidavit stated that www.ob21.net and www.pribumiperkasa.com were both registered in his name and the latter (www.pribumiperkasa.com) was not the official website nor was it owned by the organisation known as 'Pertubuhan Pribumi Perkasa Malaysia' (PERKASA).

[9] It was also highlighted to us that although the second contemnor had admitted on affidavit that he was the President of PERKASA and that the first contemnor was a member of PERKASA, the second contemnor had nevertheless categorically denied that the website www.pribumiperkasa.com was the official website of PERKASA, it was and remained always the personal website operated by the first contemnor.

[10] The second contemnor further denied that he was in any way responsible for the contents of material found on the first contemnor's website and that, in any event PERKASA's official website at the material time was http://pribumiperkasa.org/ (which had been launched on 21 October 2008) **A**

[11] It need to be noted that the contempt proceedings had been instituted against the second contemnor on the basis that the second contemnor was the President of PERKASA and that the article had been found on the 'official website' of PERKASA. **B**

It was submitted that the learned judge had disregarded the denial and the several averments of both the first and second contemnors, and had clearly omitted to give due consideration to the fact that PERKASA's official website in any event was another namely — http://pribumiperkasa.org/. **C**

[12] In the circumstances, it was argued that the learned judge was clearly in error or had misdirected himself when it was ruled by the court as follows: **D**

> ...
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> As the President of PERKASA, the second contemnor knew or ought to have known of the article and its contemptuous contents at the time of the publication and circulation. However the second contemnor failed to prevent its publication and further circulation. **E**
>
> Neither did the second contemnor disown the article nor distance himself and PERKASA from the article ...
>
> By *failing to disown disavow or distance himself* from the article at the material time the second contemnor *had committed contempt by omission* in that he had allowed the court and the judge to be scandalised when it was within his power and means as President of PERKASA not only to disown, disavow or distance himself from the article but to see that it was removed from the website ... (Emphasis added.) **F**

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[13] It was urged upon us that there was no evidence to show that the second contemnor had been consulted or had been made aware of the article written by the first contemnor. The only link relied upon by the plaintiff to implicate the second contemnor was the website http:www.pribumiperkasa.com and the wrongful acceptance by the learned judge that this was the 'official website' of PERKASA. Such a connection had been disproved by the contents of the affidavits filed by the first and second contemnors, which, it was submitted, had not been rebutted. **H**

[14] The burden was, it was further stressed, upon the plaintiff to *prove beyond any reasonable doubt* that the second contemnor had personally known or conspired to commit the contemptuous act or that the publication or circulation of the article was within the second contemnor's control (*Asia Pacific Parcel Tanker Ptd Ltd v The Owners of the Ship or Vessel 'Normar* **I**

Splendour' [1999] 6 MLJ 652; [1999] 7 CLJ 213). This, it was contended had not been discharged in any event by the plaintiff.

PLAINTIFF'S SUBMISSION

[15] The plaintiff maintained that the article was published on PERKASA's 'main website'. It was argued that the contents of the article was written and published to bring the court and a judge into contempt and to ridicule the judicial authority generally. In other words it was intended to obstruct or interfere with the administration or the course of justice.

[16] It was submitted that even an 'omission' to take steps to remove or prevent further publication knowing that the article was scurrilous and contemptuous, could rightfully form the foundation of an action in contempt against second contemnor.

[17] Counsel for plaintiff also referred to s 51(1) and s 51(2) of the Societies Act 1966 and contended that those provisions were not limited to an offence under that Act but was wide enough ('... any offence ...') to deem the second contemnor, as the person managing or assisting in the management of a society, (in this case PERKASA) was liable for 'contempt' which was punishable in terms similar to a criminal offence. In any event, it was submitted that the second contemnor had not exercised 'all due diligence to prevent the commission of the offence' and it was also alleged that the second contemnor had failed to take any steps to remove or discontinue the publication; the article had attracted wide public attention in the meanwhile.

[18] It was urged upon us that since the learned judge had made a 'finding of fact', namely, that the second contemnor had 'constructive knowledge', the issue of whether there was any 'intention' or not was no longer relevant; it would only have a bearing when considering the sentence to be meted out for the contempt.

[19] Finally, it was submitted for the plaintiff, that the punishment of both, custodial sentence (one day) and fine was appropriate in this case considering the seriousness of the contempt scandalising the court and the unwarranted scurrilous personal attack mounted against the trial judge; there was no valid reason to interfere with that sentence.

OUR OBSERVATIONS AND DECISION

[20] We must at the outset register our concurrence with the finding of the learned judge who heard this committal proceedings that the blog written by

the first contemnor titled 'Kes Saman Utusan: Mahkamah Bodoh Jika Anwar Menang' (some 21 paragraphs) in www.ob21.net was outright contemptuous of the court in that:

(a) while the decision in the main suit was still pending (*sub judice*) it challenged and imputed that court would be 'stupid' to allow the plaintiff's claim in that defamation action;

(b) it scandalised the court by stating that the malaysian judiciary had been biased in favour of opposition figures (like the plaintiff) in their judgments of late;

(c) the obvious intention behind the blog was to exert pressure on the trial judge to decide against the plaintiff;

(d) it went on to make opprobrious personal attack on VT Singham J, the trial judge;

(e) taken as whole, the material published cast serious aspertions on the integrity and impartially of the court in the administration of justice and this was clearly calculated to lower the standing of our courts in the eyes of the public.

[21] Considering the gravity of the contempt, we were mindful that, primarily the writer, and also any others properly shown to be linked to that material that had been published, deserved the strongest condemnation and sanctions in order that the dignity of the court was not so flippantly or callously tarnished.

[22] We need however at this point make note of two particular matters. *Firstly*, only the first five paragraphs of the whole blog were republished in www.pribumiperkasa.com. Nevertheless within it (the article) was included a footer as follows:

> selanjutnya baca di sini.
>
> Ps/ — Tulisan asal untuk ob21.net.

[23] *Secondly*, this contempt proceedings against the second contemnor was premised upon the allegations:

(a) that www.pribumiperkasa.com was the official website of PERKASA, and

(b) the second contemnor, in his position as the President of PERKASA, was liable for that offending material.

[24] Having considered the submission of respective counsel (including the Bar Council as *amicus curiae*) and having reviewed the various documents in

A the appeal record, we were of the view that there was only two questions that had to be dealt with in this appeal.

These two questions were distinct from one and another and had to be addressed separately; any tendency towards confusing the two questions ought B to be carefully and consciously avoided by us.

[25] The two questions were:

(a) whether there was sufficient evidence to conclude that www.pribumiperkasa.com (where the article was published) was linked C to or could be safely held to be a mouthpiece also of PERKASA; and

(b) whether there was sufficient material before the learned judge hearing the contempt proceedings to hold, as the Lordship did, namely, that the second contemnor '... knew or ought to have known of the article and its D contemptuous contents at the time of its publication ...' in www.pribumiperkasa.com.

[26] It should also be stated here that the correctness of the learned judge's E further finding that the second contemnor failed to disown, disavow or distance himself from the article and thereby had '... committed contempt by omission' would invariably depend on the determination of the second question as identified above.

F **[27]** We were mindful that allegations of contempt against the court or a judge (*R v Grey* (1900) 2 QBD 36, with respect to a personal attack on a judge) was a serious matter and committal proceeding itself was criminal in nature. In *Re Bramblevale Ltd* [1970] 1 Ch 125, Lord Denning MR had this to say:

G > A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt.

[28] In *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ H 167; [1991] 1 CLJ Rep 22, the court ruled:

> The proof that is required to establish this type of contempt in scandalising the court is stringent. In *Lim Kit Siang's case*, this court has held that proceedings for contempt constituting an attack on the judiciary requires strictest burden of proof.

I The Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849 reaffirmed that it is settled law that since committal proceeding involve the liberty of an alleged contemnor, be it civil or criminal contempt, the standard of proof required was proof beyond reasonable doubt.

[29] It has also be held that should any doubt arise as to the culpability of the alleged contemnor, it ought to be resolved in favour of the alleged contemnor. (*AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2012] 1 LNS 478; *Wee Choo Keong v MBF Holdings Sdn Bhd & Anor* [1995] 3 MLJ 549).

[30] Returning then to the first question above, both the contemnors, it must be noted, have denied that www.pribumiperkasa.com (where the impugned article was published) was ever the official website of PERKASA. The second contemnor asserted that the official website of PERKASA was www.pribumiperkasa.org.

However the second contemnor in the affidavit in reply affirmed by him on 4 April 2013 at paras 5.3 and 5.4 state as follows (in the translation in English):

> 5.3. Perkasa launched its official website on 21st of October, 2008 at the website of http://pribumiperkasa.org/.
>
> ...
>
> 5.4. However this website was never maintained and is no longer in use.

[31] The learned judge in his grounds of decision at para 19, had found as follows:

> 19. The second contemnor is the President of PERKASA. It is the finding of this court that there is evidence before this court to connect the Pribumi PERKASA website and PERKASA itself. See:
>
> (1) Exhibit 'WTS2' of encls 51 and 52 which contains a comment posted by Mr Zainuddin that 75% of the articles on the Pribumi Perkasa website are monitored by the Ketua Penerangan of PERKASA and the Deputy President of PERKASA.
>
> (2) Exhibit 'WTS3' of encls 51 and 52 which display a clear endorsement on the footer of the Pribumi Perkasa website that reads: 'llham cipta terpelihara untuk Pribumi Perkasa Negara'.
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> (3) Exhibits 'WTS5' to 'WTS10' of encls 51 and 52 which provides a sample of the state PERKASA website all of which contain, inter alia, weblinks to the Pribumi Perkasa website.

[32] We have examined the exhibits referred to by the learned judge (introduced by an affidavit filed for the Bar Council). There was no cause for any doubt in our mind that the website www.pribumiperkasa.com was effectively the mouthpiece of PERKASA, notwithstanding that it was registered and operated by the first contemnor. The second contemnor himself admitted that ww.pribumiperkasa.org was not maintained and no longer in use.

[33] Exhibit 'WTS2' clearly was an acknowledgment by the first contemnor that the contents of www.pribumiperkasa.com were monitored by responsible office-bearers of PERKASA. Exhibit 'WTS3' sought to assert copyright of materials to PERKASA and exhs 'WTS5' to 'WTS10' were website of PERKASA's individual state u nits and they were all linked to this website www.pribumiperkasa.com.

It was also not in dispute that one Media Perkasa Sdn Bhd had also used www.pribumiperkasa.com to recruit new members for PERKASA.

[34] In our assessment of all the relevant evidence on this score that was before the court on affidavit, the second contemnor's attempt to distance PERKASA from the offending material on account that PERKASA had another official website (www.pribumiperkasa.org) was indeed shallow and a feeble stance. Similarly, the contention of counsel for the second contemnor that the learned judge had failed to appreciate that there was a difference between the two websites could not be accepted and was devoid of any merit.

[35] We then deal with the second question which we found to be the crucial one of the two, for a proper determination of this appeal before us.

It was submitted to us that the impugned article was available on the internet between 7 January 2013 and 10 January 2013, before it appeared to have been removed. The article had also been referred to in a report in the Free Malaysia Today online news portal on 8 January 2013.

[36] It was contended that the second contemnor as President of PERKASA at the material time would have known or ought to have known of the notoriety or publicity generated by the said article. Counsel for the Bar Council argued that the second contemnor should in any event be imputed with constructive knowledge (knowledge that one using reasonable care or diligence should have, and therefore attributed by law to a given person — quoting Black's *Law Dictionary*).

[37] Counsel for Bar Council also cited a passage from VG Ramanchandran's *Contempt of Court* (6th Ed) in support of his contention and we reproduce the same here:

> The second category of cases adverted to are cases where the court might hold that the *mere existence of circumstances which might have reasonably put a person on enquiry* would be sufficient to attract the law of contempt. This, for example, might be the case where the alleged contemnor is definitely shown to have knowledge of the fact or is placed in such a position that he would have had the knowledge of the pendency of proceedings. Such knowledge could be inferred from the tenor or nature of the contents of the impugned article or from the position of the contemnor in relation to the parties from other circumstances. (Emphasis added.)

[38] Counsel for both the plaintiff and the Bar Council made reference to ss 51(1) and 51(2) of the Societies Act 1966 and argued that they were wide enough ('any offence') to include within its scope the contempt allegedly committed here and it applied to the second contemnor in his position as President of PERKASA. It was further submitted the second contemnor could not avail of the defences prescribed there, namely that, '... the offence was committed without his knowledge' and '... that he had exercised all due diligence to prevent the commission of the offence'.

[39] Counsel for the second contemnor on the other hand highlighted to us the following passage from the judgment in *Stemlife Berhad v Bristol Meyers Squibb (M) Sdn Bhd & Anor* [2009] MLJU 1248; [2009] 1 LNS 1272 which made an important distinction as between material that was printed in media like the newspaper or book and those material found posted on a website.

> First and foremost I would like to stress that the nature of statements printed in media like newspaper or books is of a different nature as compared to statements which is posted in the internet or websites. *The difference is not as to the result after it is printed but more so at the beginning before the statement or matter is out in printed form*. Take for instance a matter that is to be printed in books or newspapers, the editor or publisher would have the opportunity to edit or vet the material first before it is put in printed form. The issue of whether editor or publisher did really read or edit the material, does not matter, but what is of importance is that he would have the opportunity to ensure that before it is put in printed form, the words of the statement does not offend others. Thus the editor or the publisher would have notice or at least knows what is about to be printed. Compare this with the situation of an individual who posts his/her views or statements on to the website, which more often than not is not being subjected to editing; *the owner or proprietor of the website would not be in the know of what is to be put up on the website until it is on the website, which by that time the damage is already done*. Now, can the owner or proprietor of a weblog/website be responsible for such acts of individuals when there is no advance knowledge or notice been made available to him as to the defamatory statements about to made on to his website.
>
> My considered view on this is that as in the example of printing of materials in the newspapers or books, there is *some element of control* which is present in the publisher or the editor, whereas there is none as in internet service providers such as the first defendant. Here we are talking about before the words or statements are to be printed. No doubt the first defendant can remove any postings on the website, however that is *after* it has been put on the website, not before. This is the sort of control that is available to the first defendant.
>
> The manner of postings being put onto website is that it appears directly onto the website at the click of a button. This is where the first defendant loses its control vis-a-vis as to what is to be put on the website.

This, to us, was a significant distinction which had to be borne in mind when determining whether the second contemnor had 'knowledge' or could be deemed to have knowledge or could be deemed liable for the article found on

www.pribumiperkasa.com on 7 January 2013. It was asserted that in any case, the article had been removed from the website by 10 January 2013, that is, within three days of its being first loaded on to the website.

[40] As pointed out earlier the material part of the learned judge's finding implicating the second contemnor was:

(a) that he knew or ought to have known of its contemptuous contents and flowing from that;

(b) that he had committed *contempt by omission* (in not disowning, disavowing or distancing himself).

What was in effect being postulated here by the learned judge was that a mere passive role or 'silence' by second contemnor could amount to 'contempt of court'.

[41] We however found it difficult to accept this as a sound principle of law (even if valid) to be applied in the factual circumstances obtaining in this case.

It would have been another matter if it was shown on evidence that the appellant did in fact have actual or real knowledge of or sanctioned the publication of the impugned article on the website in question or even that, he subsequently became aware of such publication but did not do anything to remove the same.

[42] We were referred by counsel for the Bar Council to *Rex v Walter* (1799) 170 ER 524 and *Byrne v Deane* [1937] 1 KB 818 to show that there could arise 'contempt by omission' notwithstanding that one was not the author or was directly involved in the publication of the offending material so long as positive steps were not taken to stop the publication or to remove the material.

Both those cases, it must be noted related to proceedings in defamation (the former against proprietor of a newspaper in criminal defamation and the latter against proprietor of a club) and in reading those cases, it was clear to us that liability was determined as against them stemmed from the fact that they had direct knowledge of the defamatory material but recklessly 'published' it in *Walter's* case or in the latter (*Byrne*) took no action to remove the material from the club notice board; it was not per se because they held a responsible position in the newspaper or club respectively.

[43] A case for 'contempt by omission' could no doubt arise if there was defiance to the terms of or wilful disregard to any order issued by the court to do or to restrain from doing some act. A person who had notice of such a court order (but was not a party to the proceedings itself) who defied the same could also be similarly held liable for contempt. This was the fact situation in *Grocon & Ors v Construction, Forestry, Ministry and Energy Union & 2 Ors* [2014] VSC

134 and could not therefore be of assistance to what was being contended by counsel for the Bar Council.

[44] The second contemnor has maintained in this instant case that at all material times he had no knowledge whatsoever of the article concerned; this fact was never challenged or rebutted by the respondent. Hence, with respect to the learned judge, the issue that the appellant failed to 'disown, disavow or distance himself from the article, did not arise and could not rightfully form the basis for the so called 'contempt by omission' held to have been committed by the appellant.

[45] In the light of the above it was not necessary for us to decide whether the term 'any offence punishable with a fine or imprisonment has been committed' in the opening lines of s 51 (1) of the Societies Act 1966 was limited to offences made punishable under that legislation only or did extend to include other 'offences' recognised within the wider purview of the law or even 'contempt of court' proceedings.

In any event, *even if* the second contemnor was caught within that section as the President of PERKASA, we were of the view that he could avail himself of the defence expressly provided to displace that deeming provision, namely, this court has been satisfied, as shown above, that the impugned article was published without the second contemner's actual knowledge and he had no control as to the so called 'commission' of the 'offence'. if at all it occurred when it was uploaded onto the website www.pribumiperkasa.com/.

[46] For the reasons elaborated and discussed above, we were of the view that the learned judge were clearly in error both on the facts and in law to hold that the appellant had committed contempt of court as alleged by the respondent. We therefore are of the unanimous view that this was a fit case for appellate intervention.

The findings of the learned judge that the appellant had committed contempt of court was unsafe to be sustained. We accordingly set aside the punishments imposed by way of committal on the second contemnor/appellant. We order that the fine imposed, if paid, be refunded.

Appeal allowed, setting aside the finding of contempt against the appellant and ordering his fine, if paid, to be refunded

Reported by Ashok Kumar